# Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-45–07 OF 2016(W)
ZULKEFLI PCA, SURIYADI, RAMLY ALI, BALIA YUSOF AND JEFFREY TAN FCJJ
9 NOVEMBER 2017

*Companies and Corporations — Members' rights — Minority shareholders — Petition under s 181 of the Companies Act 1965 — Whether there were oppressive acts by majority shareholders against minority shareholders — Whether proceedings ought to be brought by way of derivative action under s 181A of the Companies Act 1965 — 'Reflective loss principle' — Whether applicable — Whether remedies under s 181 of the Companies Act 1965 available to shareholder — Comapnies Act 1965 s 181*

In 1995, the appellant ('the petitioner') and the second respondent agreed to carry out a construction business through a joint venture company, the first respondent ('the company'). According to the petitioner, in a discussion preceding the setting up of the joint venture business, there was an understanding that at least five construction projects would be made available to the company, although the immediate objective was to carry out two projects. However, the further three projects allegedly promised were not secured or awarded to the company and that even in the case of the two projects, the contracts obtained by the company were the result of a tender exercise. The petitioner further submitted that there were monies recoverable or due to the company and/or that the finances of the company did not reflect the true position of the company's financial state. In 2006, the petitioner filed a petition, against the respondents, at the High Court under s 181 of the Companies Act 1965 ('the CA') on the ground of oppression by the majority shareholders of the minority shareholders' interest. The petitioner sought orders that: (a) the second to seventh respondents purchase the petitioner's shares in the first respondent ('the company'); (b) the second and fourth respondents pay to the company all debts owed to it; and (c) a certified public accountant be appointed to inspect the accounts of the first respondent and to report to the court of the results of the inspection. The High Court judge allowed the petition and held that: (i) the acts of the respondents unfairly discriminated and were prejudicial to the petitioner as a member and shareholder of the company; and (ii) the affairs of the company were conducted in an oppressive manner adversely affecting the financial interest of the petitioner. Aggrieved by the decision of the High Court, the respondents appealed to the Court of Appeal. In allowing the appeal, the Court of Appeal

held that: (1) there was acquiescence as well as delay by the petitioner in bringing the petition; and (2) the recourses available to the petitioner was by way of derivative action under s 181A of the CA to recover first monies due to the company and/or effect appropriate corrections to the company's financial statements. Hence, the present appeal.

**Held,** allowing the appeal with costs:

(1) The Court of Appeal wrongly held that there was acquiescence as well as delay by the petitioner in bringing the petition where there was no evidence of acquiescence and where the evidence showed that the petitioner had persistently pursued its claims and received no answers from the respondents. Furthermore, the issue of delay was never raised in the affidavits or submissions of parties until after the completion of the trial. The minority oppression petition was an equitable remedy and equitable defences as distinguished from legal defences have to be considered. Mere delay without acquiescence was not a defence in equity. There was never any conduct of the petitioner which could amount to waiver. There was positive evidence that there was no waiver or acquiescence (see paras 29–32).

(2) The petitioner's claims in this petition related to the oppressive conduct of the respondents who benefited as the majority shareholder to the detriment of the petitioner as the minority shareholder. The claims had all the hallmarks of a minority oppression petition and none of the hallmarks of a derivative action as: (a) the wrongful conduct in this case did not affect all the shareholders equally; (b) in a derivative action, the relief was sought on behalf of a company for the benefit of that company; (c) there was a personal element; and (d) a derivative action would serve no purpose for the petitioner since it could only seek to restore benefits to the joint venture company (see para 35).

(3) The 'reflective loss' principle could have no application to this case where there was no claim by the company. The reflective loss principle only applied when the company suffered loss caused by the breach of duty owed both to the company and the shareholder. The 'reflective loss' principle had absolutely no application in a minority oppression petition where the diminution in value of the minority share could be attributed, as in this case, to the oppressive conduct of the majority shareholders and its affiliates. The loss was not a loss in respect of which the company had a claim of its own and there was no question of double recovery (see paras 36–37).

**[Bahasa Malaysia summary**

Pada 1995, perayu ('pempetisyen') dan responden kedua bersetuju menjalankan satu perniagaan pembinaan melalui satu syarikat usaha sama iaitu

responden pertama ('syarikat'). Menurut pempetisyen, dalam perbincangan yang membawa kepada pembentukan perniagaan usaha sama ini, terdapat satu persefahaman bahawa tidak kurang daripada lima projek pembinaan akan diberi kepada syarikat, walaupun objektif semasa adalah untuk menjalankan dua projek. Walau bagaimanapun, ketiga-tiga projek selanjutnya, yang dijanjikan, tidak diperoleh mahupun diaward kepada syarikat dan, malah dalam kes dua projek tersebut, kontrak-kontrak diperoleh hasil langkah tender. Pempetisyen seterusnya menghujahkan bahawa terdapat wang yang boleh diperoleh semula atau terhutang pada syarikat dan/atau kewangan syarikat tidak mencerminkan kedudukan kewangan sebenar syarikat. Pada 2006, pempetisyen memfailkan petisyen, terhadap responden-responden, di Mahkamah Tinggi bawah s 181 Akta Syarikat 1965 ('AK') atas alasan penindasan oleh pemegang-pemegang saham majoriti terhadap kepentingan pemegang-pemegang saham majoriti. Pempetisyen memohon perintah agar: (a) responden kedua hingga ketujuh membeli saham-saham pempetisyen dalam syarikat; (b) responden kedua dan keempat membayar kepada syarikat semua hutang yang terhutang; dan (c) seorang akauntan awam yang diiktiraf dilantik memeriksa akaun responden pertama dan melaporkan kepada mahkamah akan keputusan pemeriksaan tersebut. Hakim Mahkamah Tinggi membenarkan petisyen dan memutuskan: (i) tindakan-tindakan responden-responden, secara tidak adil, mendiskriminasi dan memprejudis pempetisyen sebagai ahli dan pemegang saham syarikat; dan (ii) hal ehwal syarikat dijalankan dalam keadaan menindas lalu menjejaskan kepentingan kewangan pempetisyen. Terkilan dengan keputusan Mahkamah Tinggi, responden-responden merayu ke Mahkamah Rayuan. Dalam membenarkan rayuan tersebut, Mahkamah Rayuan memutuskan: (1) terdapat persetujuan dan kelengahan oleh pempetisyen dalam memulakan petisyen; dan (2) penyelesaian yang ada buat pempetisyen adalah melalui tindakan derivatif di bawah s 181A AK untuk memperoleh terlebih dahulu wang yang terhutang pada syarikat dan/atau menguatkuasakan pembetulan-pembetulan yang sepatutnya pada penyata kewangan syarikat. Oleh itu, rayuan ini difailkan.

**Diputuskan,** membenarkan rayuan dengan kos:

(1) Mahkamah Rayuan terkhilaf dalam memutuskan terdapat persetujuan dan kelengahan oleh pempetisyen dalam memulakan petisyen sedangkan tiada keterangan persetujuan dan terdapat keterangan yang menunjukkan pempetisyen terus-menerus mengemukakan tuntutannya namun tidak menerima apa-apa jawapan daripada responden-responden. Selanjutnya, isu kelengahan tidak pernah dibangkitkan dalam afidavit mahupun hujahan pihak-pihak hinggalah penutup perbicaraan. Petisyen penindasan minoriti adalah remedi berekuiti dan pembelaan berekuiti, sebagai pembelaan undang-undang, perlu dipertimbangkan. Kelengahan sahaja tanpa persetujuan bukan pembelaan dalam ekuiti. Tiada apa-apa tindakan pempetisyen yang

terjumlah kepada penepian. Terdapat keterangan positif bahawa tiada penepian atau persetujuan (lihat perenggan 29–32).

(2) Tuntutan-tuntuan pempetisyen dalam petisyen ini berkaitan tindakan menindas responden-responden yang menerima faedah sebagai pemegang saham majoriti hingga menjejaskan pempetisyen sebagai pemegang saham minoriti. Tuntutan-tuntutan ini mempunyai ciri-ciri petisyen penindasan minoriti dan tiada langsung ciri-ciri tindakan derivatif kerana: (a) tindakan salah dalam kes ini tidak menjejaskan pemegang-pemegang saham secara sama rata; (b) dalam tindakan derivatif, relif yang dipohon adalah bagi pihak syarikat, bagi faedah syarikat itu sendiri; (c) terdapat elemen peribadi; dan (d) tindakan derivatif tidak mendatangkan keuntungan pada pempetisyen kerana pempetisyen hanya ingin mengembalikan faedah-faedah kepada syarikat usaha sama (lihat perenggan 35).

(3) Prinsip 'reflective loss' tidak terpakai dalam kes ini kerana tiada tuntutan oleh syarikat. Prinsip 'reflective loss' ini hanya terpakai apabila syarikat mengalami kerugian yang disebabkan oleh pelanggaran kewajipan terhadap syarikat dan pemegang saham. Prinsip 'reflective loss' langsung tidak terpakai dalam petisyen penindasan minoriti yang mana pengurangan nilai saham minoriti, dalam kes ini, disebabkan oleh tindakan menindas oleh pemegang-pemegang saham dan sekutu-sekutunya. Kerugian bukanlah kerugian yang mana syarikat mempunyai tuntutannya sendiri dan persoalan tuntutan berganda tidak timbul (lihat perenggan 36–37).]

**Notes**

For cases on members' rights in general, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 634–723.

**Cases referred to**

*Fitzgerald v Masters* (1956) 95 CLR 420 (refd)

*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, FC (refd)

*Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, HL (refd)

*Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10; [2014] 2 CLJ 401, FC (refd)

**Legislation referred to**

Companies Act 1965 ss 181, 181A, 300, 303, 304, 305, 306

*WSW Davidson (Karen Ng Yueh Ying and Kenny Chan Yew Hoong with him) (Azman Davidson & Co) for the appellant.*

*Porres Royan (Prem Ramachandran with him) (Kumar Partnership) for the respondents.*

**Zulkefli PCA (delivering jugdment of the court):**

INTRODUCTION

**[1]** This is an appeal by the appellant against the decision of the Court of Appeal in allowing the appeal by the respondents against the decision of the High Court. The appellant was the petitioner in the s 181 petition of the Companies Act 1965 at the High Court and the respondents in the present appeal were the respondents. We shall refer to the respective parties as they were before the High Court.

**[2]** The learned High Court judge allowed the petitioner's s 181 petition and made the following orders:

(a) an order that the second, fourth, fifth, sixth and seventh respondents jointly and severally purchase the shares owned by the petitioner in the company at such price and terms determined by the court; after making all necessary adjustments to the accounts of the company to compensate for the acts and oppression of the respondents;

(b) an order that the second and fourth respondent pay, or cause its subsidiaries or associated companies to pay the first respondent all debts owed to it by the second and fourth respondent or its subsidiaries or associated companies in connection to the lease agreement and loans extended to the undisclosed 'fellow subsidiaries'; and

(c) an order that a certified public accountant be appointed to inspect the accounts of the first respondent for the period beginning June 1995 to the date of this order, and to report to this honourable court of the results of the inspection.

**[3]** On appeal, the respondents' appeal was allowed with costs. The orders of the High Court judge were set aside.

QUESTIONS OF LAW

**[4]** This court had granted the petitioner leave to appeal on 21 June 2016 on the following questions of law:

(a) whether in the circumstances of this case, the applicant's only remedy lay in a derivative action in the name of the first respondent company to the exclusion of any remedy for minority oppression under s 181 of the Companies Act 1965? and

(b) whether in the circumstances of this case, the reflective loss principle had any application?

BACKGROUND FACTS

**[5]** The petitioner ('Rinota Construction Sdn Bhd') and the second respondent ('Mascon Sdn Bhd') had in early 1995 agreed to carry out construction business through a joint venture company, the first respondent (Mascon Rinota Sdn Bhd) ('the company').

**[6]** The petitioner and the second respondent contributed RM200,000 and RM300,000 respectively to the issued and paid-up capital of the company.

**[7]** There was however no written 'Shareholders Agreement' or 'Joint Venture Agreemet' entered into by the parties. Accordingly the relationship between the shareholders inter se and the operations of the company were solely dictated by the company memorandum and articles of association.

**[8]** The second respondent is a subsidiary of the third respondent ('Olympia Industries Bhd'). The third respondent holds 71% of the equity of the second respondent. The controlling shareholders of the third respondent are the fourth respondent ('Dato' Yap Yong Seong'), his son the fifth respondent ('Yap Wee Keat') and other family members.

**[9]** The third respondent has other wholly owned subsidiaries that is Jupiter Securities Sdn Bhd (Jupiter), Olympia Leisure Sdn Bhd (Olympia Leisure) and Olympia Land Bhd (Olympia Land). The sixth respondent ('Mascon Construction Sdn Bhd') is a wholly owned subsidiary of the second respondent.

**[10]** At all material times the second respondent remains as the controlling shareholder of the company. The particulars of the board of directors of the company are as follows:

(a) the fifth respondent (nominated by the second respondent);

(b) Ng Chee Hua (nominated by the second respondent);

(c) Ng Poh Hwa (nominated by the second respondent);

(d) Richard Tankersley (nominated by the petitioner); and

(e) Lau Luen Wah (nominated by the petitioner).

**[11]** Sometime in 1995, Ng Kwee Ying (f) replaced Lau Luen Wah as the petitioner's second nominee on the board of the company. Subsequently Ng Chee Hua and Ng Poh Hwa both resigned from the board on 1 July 1996, and were replaced by Yeoh Sek Phin as a director nominated by the second respondent.

**[12]** The fifth respondent resigned from the board on 6 September 1999. Richard Tankersley, Ng Kwee Ying and Yeoh Sek Phin remained as the directors of the company.

**[13]** On 1 November 1995, Yeoh Sek Phin was appointed as executive director of the second respondent and also took over as director in charge of the company. Richard Tankersley is the managing director and controlling shareholder of the petitioner.

**[14]** It was agreed between the fifth respondent and Richard Tankersley that the company would be given the opportunity to carry out a minimum of five projects on a negotiated managing contractor cost plus basis to be provided by the Olympia group, namely:

(a) Casa Lago Condominium project;

(b) the Harbour Club project;

(c) the Hyatt Hotel (Malacca) project;

(d) two more proposed blocks of condominiums immediately adjacent to the Casa Lago project; and

(e) a minimum of one tower block at Olympia's project site in Sentul, Kuala Lumpur.

**[15]** It was also agreed that the petitioner and Richard Tankersley would participate actively in the project. It was further agreed by the parties that the third respondent would provide the budget for each project and that the contracts would be negotiated within the project budgets on a managing contractor cost plus basis.

**[16]** In consideration of the aforesaid agreements, the petitioner agreed to take a minority stake in the company. The parties agreed that from the commencement of the business of the company, Richard Tankersley would initially act as the director supervising the project manager. The second respondent would be in charge of the administration and finance of the company.

**[17]** On the basis of the above understandings, the company was duly incorporated.

**[18]** In 1995, the Casa Lago and the Harbour Club projects was awarded to the Company by Olympia Land Bhd ('OLB'). The said development was completed in December 1996. The final accounts related to the two said projects for OLB were signed of in January 1999.

**[19]** The main complaint raised by the petitioner could be summarised as follows:

(a) the non-award of further 'negotiated construction contracts' allegedly expected by the company; and

(b) those financial or accounting discrepancies which arguably meant that the audited annual accounts of the company as drawn up did not reflect the true value of or the proper financial state of the company.

**[20]** In 2006, the petitioner filed a s 181 petition. The petitioner's cause of action alleges oppression by the majority shareholders of the minority shareholders' interest. The petitioner sought the following reliefs:

(a) an order that the second to seventh respondents do jointly and severally purchase the shares owned by the petitioner in the company at such price and terms determined by the court; after making all necessary adjustments to the accounts of the company to compensate for the acts and oppression of the respondents;

(b) an order that the second and fourth respondents pay, or cause its subsidiaries or associated companies to pay the first respondent all debts owed to it by the second and fourth respondents or its subsidiaries or associated companies in connection to the lease agreement and loans extended to the undisclosed 'fellow subsidiaries'; and

(c) an order that a certified public accountant be appointed to inspect the accounts of the first respondent for the period beginning June 1995 to the date of this order, and to report to the court of the results of the inspection.

PROCEEDINGS IN THE HIGH COURT

**[21]** The learned High Court judge allowed the petitioner's s 181 petition. In Her Ladyship's judgment she alluded that the acts of the respective respondents have unfairly discriminated and are prejudicial to the petitioner as a member and shareholder of the company. The affairs of the company were conducted in an oppressive manner adversely affecting the financial interest of the petitioner.

**[22]** The learned High Court judge accepted the petitioner's version of the oppressive conduct as the reasonable, credible and probable version, on the ground that it is cogently supported by both oral and documentary evidence. Her Ladyship found that the evidence adduced for the respondents were self-destructive and clearly contradicts their own contemporaneous documents and oral evidence.

**[23]** The learned High Court judge found the following to be oppressive conduct, namely:

(a) Olympia Group/second respondent taking over the first respondent's ('the company') construction equipment and using it in their own projects without paying commercial rental to the company;

(b) unauthorised disposal of the principle assets of the company without consent or knowledge of the petitioner or its directors on the company's board;

(c) the accounting treatment of the construction equipment whereby the second respondent claimed beneficial ownership of the whole of the same by virtue of having paid the third to fifth years of the lease instalments (roughly 3/5th of same, the remaining 2/5th having been paid by the company); while at the same time debiting back to the company (without the knowledge of the petitioner) all these instalment payments without giving credit in the form of commercial rental for the use by the second respondent of the equipment and thereby putting the company into what appears to be a heavily insolvent position;

(d) discrimination in charging of interest on moneys owing by the company to the second respondent (including the instalment payments) while no interest was claimed on behalf of the company for moneys owing to it by other subsidiaries;

(e) completely ignoring all the petitioner's legitimate complaints;

(f) the accounting treatment of the company whereby debit notes were continuously raised by the second respondent against the company without the knowledge of the petitioner or their representatives in the board of the company and without any independent acknowledgment for or on behalf of the company;

(g) using their control over the company as contractor and Olympia Land Bhd as employer in respect of the contracts for the Casa Lago and Harbour Club projects to deprive the company of cash flow to which they were entitled;

(h) disregard by the controllers of the company of the agreement and/or understanding arising from the discussions which led to the formation of the company and disregard of the legitimate expectations of the petitioner arising from the same; and

(i) having formed the company as a subsidiary of the second respondent operating in the same class of business, failing in its obligation to deal fairly with the company and in adopting a policy of leaving the company to die.

PROCEEDINGS IN THE COURT OF APPEAL

**[24]** Aggrieved by the High Court decision the respondents appealed to the Court of Appeal. The Court of Appeal allowed the respondents' appeal.

**[25]** The issues which arose before the Court of Appeal were:

(a) whether the given facts amounted to 'oppressive acts' or 'conduct in disregard' to the petitioner's interest such as would be sufficient to warrant the granting of any relief under s 181 of the Companies Act 1965; and

(b) whether the existence of those facts ipso facto meant that the remedies under s 181 Companies Act 1965 should be granted to the petitioner as was done by the High Court.

**[26]** The Court of Appeal found that there was no legal or sustainable basis for the exercise of the court's discretion under s 181 of the Companies Act 1965, to allow the petition and make the orders for a reassessment of the company's financial records/state and thereafter for a buyout of the petitioner's shares in the company by the second, fourth, fifth, sixth and seventh respondents. The Court of Appeal, inter alia, held that:

(a) the question of delay in filing the petition was of paramount importance in any consideration of the exercise of the court's discretion under s 181 of the Companies Act 1965. Herein, this petition was only filed in 2006, ie ten years after those matters complained of had first occurred. Acting without expediency to protect or further one's rights when an alleged breach or violation of such right arose amounted to acquiescence, meaning acceptance or consent to that situation. The court should deny relief to an interested party who had sat on his rights and accepted tacitly such practices or decisions adopted by a company in its business affairs over time, but who now wished to advance matters related to or arising therefrom as a grievance for relief under s 181 of the Companies Act 1965 (see p 11 of the Court of Appeal grounds of judgment);

(b) the petitioner qua shareholder of the company was seeking for a buyout of the petitioner's shares by, not just the second respondent, but others who were not members of the company. It was trite that relief to be allowed under s 181 of the Companies Act 1965 was discretionary to be determined by the court upon equitable principles, inclusive of the conduct of the parties taken in its totality. The petitioner here was also restricting the relief that was being sought to a forced buyout of their shares in the company which, admittedly for all intents and purposes, was a dormant entity as at the date the petition was filed (see pp 11–12 of the Court of Appeal grounds of judgment);

(c) there is a well-established principle in corporate law that bars a shareholder from directly bringing or relying on 'losses' of the company to seek relief for himself unless by way of derivative action. This was known as the 'reflective loss principle'. The principle applied where the shareholder's alleged loss was merely a reflection of the company's loss, such as where the shareholder's loss was a diminution in the value of his shares as a result of those alleged wrong to the company. In such situations, recovery by the shareholder of the loss he suffered was precluded, as this would mean making the wrongdoer liable for the same wrong twice over (see pp 17–18 of the Court of Appeal grounds of judgment); and

(d) the recourses available to the petitioner having such complaints (of loss caused to the company) was by way of derivative action brought under s 181A of the Companies Act 1965 to recover first monies due to the company and/or effect appropriate corrections to the company's financial statements. Another avenue that was open to the petitioner was to go for outright winding up of the company on just and equitable grounds. In the latter event, the liquidator is empowered to examine the company's account, investigate wrong doings, rectify errors in accounting and even bring needful proceedings against those that had caused the 'losses' to the company (ss 300, 303, 304, 305 and 306 of the Companies Act 1965) including recovery action against delinquent officers or shareholders of the company (see p 20 of the Court of Appeal grounds of judgment).

## DECISION OF THIS COURT

**[27]** At the outset we would like to state that it is quite clear from the Court of Appeal's grounds of judgment that the Court of Appeal made no attempt to scrutinise the findings of fact made by the High Court judge. The Court of Appeal failed to carry out the required analysis and the test laid down by established principles and case authorities as being necessary before a Court of Appeal as an appellate court can reverse the findings of fact of a High Court judge who had the benefit of hearing the oral testimony of the witnesses (see the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). On the contrary the Court of Appeal's judges in the present case were contented to rely on the delay point and the derivative action point which in their view made it unnecessary to go any further.

**[28]** We are of the view since the Court of Appeal was moved to intervene basically only on the two grounds and in the absence of any attempt by the Court of Appeal to critically analyse and then overrule the High Court judge's findings of fact, we take the position that there is no burden on the petitioner to reopen and justify these findings. It is our considered view that the Court of

Appeal had wrongly applied their powers of appellate intervention in reversing the finding of facts of the High Court. In the circumstances we will deal with only the two issues of the delay point and the derivative action point as raised and dealt with by the Court of Appeal.

THE DELAY POINT

**[29]** We are of the view the Court of Appeal have wrongly held that there was acquiescence as well as delay by the petitioner in bringing the petition where there was no evidence of acquiescence and where the evidence showed that the petitioner had persistently pursued its claims and received no answers from the respondents.

**[30]** It is also to be noted that this issue of delay was never raised in the affidavits or submissions of parties until after the completion of the trial. The issue was also never put in cross-examination to the petitioner's witness by the respondents. In fact the petitioner's main witness, Mr Richard Tankersley had written a total of ten letters to the respondents setting out in detail the substance of his complaints and these covered the entire period from 18 December 1997–30 March 2005. These letters showed clearly and positively that there was never any acquiescence. A reply from the respondents to the petitioner on the complaints made was merely for the petitioner to be patient and wait while they look into the complaints.

**[31]** It is our considered view that the minority oppression petition is an equitable remedy and equitable defences as distinguished from legal defences have to be considered. Mere delay without acquiescence is not a defence in equity (see the case of *Fitzgerald v Masters* (1956) 95 CLR 420 at p 433).

**[32]** It is always a question of fact in each case whether inferences can be drawn of release or waiver of the claim. On the evidence in the present case, it is clear that there was never any conduct of the petitioner which could amount to waiver. There is positive evidence that there was no waiver or acquiescence.

THE DERIVATIVE ACTION POINT

**[33]** We shall now deal with the derivative action point. The derivative action and the minority oppression petition are not mutually exclusive and there may be circumstances which give rise to both a derivative action and an oppression proceeding, but they remain distinct remedies with separate rationales and statutory functions (see the case of *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10; [2014] 2 CLJ 401).

**[34]** The essential difference between the derivative action and the minority oppression petition is that:

(a) a minority oppression petition deals with action by the minority shareholder of a company against the majority controllers where the company cannot be the petitioner and is only a nominal defendant; and

(b) by contrast a derivative action is brought by a minority shareholder for and on behalf of the company to deal with wrongs done to the company and for the benefit of the company eg to recover for the company assets which may have been unlawfully siphoned off from the company.

**[35]** The petitioner's claims in this petition relate to the oppressive conduct of the respondents who have benefitted as the majority shareholder to the detriment of the petitioner as the minority shareholder. We agree with the submission of learned counsel for the petitioner that the claims have all the hallmarks of a minority oppression petition and none of the hallmarks of a derivative action for the following reasons:

(a) the wrongful conduct in this case does not affect all the shareholders equally. They benefit the majority shareholder and its affiliates at the expense of the minority shareholder;

(b) in a derivative action, the relief is sought on behalf of a company for the benefit of that company eg to return to that company funds misappropriated by third parties. This is not the case here where the petitioner is seeking compensation for assets misappropriated by the majority shareholders;

(c) there is a personal element ie the petitioner's personal interest as minority shareholder is uniquely and directly affected by the alleged wrongful conduct; and

(d) a derivative action would serve no purpose for the petitioner since it could only seek to restore benefits to the joint venture company.

**[36]** On the 'reflective loss' principle as raised by the Court of Appeal in their judgment we are of the view that this principle can have no application to this case where there is no claim by the company. The reflective loss principle only applies when a company suffers loss caused by the breach of duty owed both to the company and the shareholder. On this point in the case of *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at p 62 it had this to say:

> In such a case the shareholders loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be

double recovery at the expense of the defendant or the shareholder will recover at the expense of the Company and its creditors and other shareholders. Neither course can be permitted.

**[37]** We are also of the view that the 'reflective loss' principle has absolutely no application in a minority oppression petition where the diminution in value of the minority share can be attributed as in this case to the oppressive conduct of the majority shareholders and its affiliates. The loss is not a loss in respect of which the first respondent's company has a claim of its own and there is no question of double recovery.

CONCLUSION

**[38]** For the reasons abovestated we allow this appeal by the petitioner with costs here and below. We answer both the questions posed in this appeal in the negative. The decision and orders of the Court of Appeal are hereby set aside. We affirm the decision of the High Court and orders made by the High Court are restored. Deposit is to be refunded to the petitioner.

*Appeal allowed with costs.*

Reported by Afiq Mohamad Noor